

1 **WO**

2  
3  
4  
5  
6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8  
9 American Family Mutual Insurance  
Company,

10 Plaintiff,

11 v.

12 Milo Bergenson, et al,

13 Defendants.  
14

No. CV09-0360 PHX DGC

**ORDER**

15 Plaintiff has renewed its motion for attorneys' fees in the amount of  
16 \$122,835.50 (Doc. 134) after the Ninth Circuit affirmed the ruling of this Court  
17 (Doc. 133-1). The motion is fully briefed. Docs. 128, 134-136. No party has requested  
18 oral argument. The Court will deny the motion.

19 Plaintiff seeks a fee award pursuant to A.R.S. § 12-341.01(A). Under Arizona  
20 law, a trial court has discretion in awarding attorneys' fees and should consider several  
21 factors when making its decision. *Velarde v. PACE Membership Warehouse, Inc.*, 105  
22 F.3d 1313, 1319-20 (9th Cir. 1997); *Associated Indemn. Corp. v. Warner*, 694 P.2d 1181,  
23 1184 (Ariz. 1985) (en banc); *Uyleman v. D.S. Rentco*, 981 P.2d 1081, 1086 (Ariz. Ct.  
24 App. 1999). Among those factors, the court should consider whether a fee award "would  
25 cause undue hardship." *Woerth v. City of Flagstaff*, 808 P.2d 297, 305 (Ariz. Ct. App.  
26 1990).

27 Defendants have submitted two affidavits explaining the financial condition of the  
28 parties who would bear any award of attorneys' fees to Plaintiff. Doc. 135-2 at 3, 5.

1 Amy Lyn and Christopher Bergeson both assert that they cannot afford to pay fees or  
2 costs. Doc. 135-2 at 3, 5. Amy Lyn is sixteen and unemployed. Doc. 135-2 at 3.  
3 Christopher is twenty-one and earns \$2,600 per month as a welder. Doc. 135-2 at 5.  
4 They currently live with their father in Tucson, Arizona. Doc. 135-2 at 3, 5. Plaintiff  
5 states that Defendants still have a pending suit against West Frontier Condominiums  
6 HOA which may yield funds to pay the attorneys' fees requested. Docs. 128 at 6,  
7 136 at 4. But Plaintiff provides no information about the likelihood of success in that  
8 lawsuit or the amount of any possible recovery. Docs. 128 at 6, 136 at 4. Given  
9 Defendants' current financial situation, the Court cannot conclude that the mere prospect  
10 of another recovery alleviates the financial hardship that would be imposed by a fee  
11 award. The Court therefore concludes, in its discretion, that an award of fees should not  
12 be made under A.R.S. § 12-341.01.

13 **IT IS ORDERED** that Plaintiff's renewed motion for award of attorneys' fees  
14 (Doc. 134) is **denied**.

15 Dated this 19th day of June, 2012.

16  
17  
18 

19 \_\_\_\_\_  
20 David G. Campbell  
21 United States District Judge  
22  
23  
24  
25  
26  
27  
28